STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Roger W. Bem	:	
	:	
v.	:	**A.A. No. 14 - 433**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Honorable Court at Providence on this 19th day of March, 2015.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Roger W. Bem urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive employment security benefits because he left his prior employment without good cause. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the decision issued by the

Board of Review in this matter is supported by the facts of record and the applicable law. I shall therefore recommend that it be affirmed.

I
FACTS & TRAVEL OF THE CASE

Mr. Roger Bem was employed by Anthony R. Nappa Construction, as a laborer, until August 20, 2014. He filed for unemployment benefits but, on September 28, 2014, a designee of the Director deemed him ineligible because he resigned without good cause within the meaning of Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and, as a result, Referee Carl Capozza held a hearing on October 14, 2014, at which Mr. Bem appeared, as did a representative of the employer, Ms. Bridget McVerry.

In his decision, issued on October 15, 2014, the Referee made the following Findings of Fact regarding Claimant's separation:

> **2. FINDINGS OF FACT:**
> The claimant last worked as a laborer on August 20, 2014. He quit his job as of that date due to his dissatisfaction with the work environment and the employer owner.

Referee's Decision, October 15, 2014, at 1. Based on these findings the Referee formed the following conclusions on the issue of claimant's separation:

> **3. CONCLUSION:**
> * * *
> In order to show good cause for leaving his job the claimant must establish and prove the job unsuitable or that he had no reasonable alternative. Based on the credible testimony presented in this case, I find that neither of these situations existed when the claimant made the personal decision to leave his job due to dissatisfaction with the employer. There was no evidence presented to indicate that the claimant had made every attempt to preserve his employment by discussing his concerns with the employer prior to leaving. Under these circumstances, it is determined that the claimant voluntarily quit his job without good cause as previously determined by the Director.

Referee's Decision, October 14, 2013, at 1. Thus, Referee Capozza found claimant to be disqualified from receiving benefits because he left work without good cause.

Claimant filed an appeal and the matter was reviewed on its merits by the Board of Review. On November 21, 2014, the members of the Board of Review issued a unanimous decision holding that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision of the Referee was affirmed. Finally, on December 8, 2014, the Claimant filed a complaint for judicial review in the Sixth Division District Court.

II
APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on voluntary leaving without good cause; Gen. Laws 1956 § 28-44-17, provides:

> **28-44-17. Voluntary leaving without good cause.** – An individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week until he or she establishes to the satisfaction of the director that he or she has subsequent to that leaving had at least eight (8) weeks of work, and in each of those eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. * * * For the purposes of this section, 'voluntarily leaving work without good cause' shall include voluntarily leaving work with an employer to accompany, join or follow his or her spouse in a new locality in connection with the retirement of his or her spouse, or failure by a temporary employee to contact the temporary help agency upon completion of the most recent work assignment to seek additional work unless good cause is shown for that failure; however, that the temporary help agency gave written notice to the individual that the individual is required to contact the temporary help agency at the completion of the most recent work assignment to seek additional work.

In the case of Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964), the Rhode Island

Supreme Court noted that a liberal reading of good cause would be adopted:

> To view the statutory language as requiring an employee to establish that he terminated his employment under compulsion is to make any voluntary termination thereof work a forfeiture of his eligibility under the act. This, in our opinion, amounts to reading into the statute a provision that the legislature did not contemplate at the time of its enactment.
>
> In excluding from eligibility for benefit payments those who voluntarily terminate their employment without good cause, the legislature intended in the public interest to secure the fund from which the payments are made against depletion by payment of benefits to the shirker, the indolent, or the malingerer. However, the same public interest demands of this court an interpretation sufficiently liberal to permit the benefits of the act to be made available to employees who in good faith voluntarily leave their employment because the conditions thereof are such that continued exposure thereto would cause or aggravate nervous reactions or otherwise produce psychological trauma.

Later, in Murphy v. Fascio, 115 R.I. 33, 340 A.2d 137 (1975), the Supreme Court elaborated that:

> The Employment Security Act was intended to protect individuals from the hardships of unemployment the advent of which involves a substantial degree of compulsion.
> Murphy, 115 R.I. at 37, 340 A.2d at 139.
>
> and
>
> * * * unemployment benefits were intended to alleviate the economic insecurity arising from termination of employment the prevention of which was effectively beyond the employee's control."

Murphy, 115 R.I. at 35, 340 A.2d at 139.

III
STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> * * *
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions

[1] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d

of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island stated in Harraka, cited supra 5, 98 R.I. at 200, 200 A.2d at 597, that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

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425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

[2] Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[3] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

IV
ANALYSIS

When analyzing a claim for unemployment benefits the first question must always be — Was the Claimant fired or did he quit? Depending on how this question is answered, follow-up questions arise, such as: (a) Was the Claimant fired for proved misconduct? or (b) Did the claimant quit for good cause? Now, in the instant case, there is no question that Claimant Bem quit. He concedes as much. And so, we must consider whether Claimant quit for good cause.

And as I view it, this issue must also be subdivided. First we must ask: why did the Claimant leave, and are these allegations, if proven, sufficient to constitute a leaving-for-good-cause, as defined in section 28-44-17? The second question then follows: were these allegations proven?

We shall now address these questions seriatim; we begin by reviewing the evidence and testimony elicited at the hearing conducted by Referee Capozza.

A

Mr. Bem's Allegation — Sufficiency

As we shall see in Part IV-B of this opinion, Mr. Bem alleged that he left the employ of Nappa Construction because his employer was abusive. Certainly, an allegation of workplace abuse, if proven, can be sufficient to justify leaving under § 28-44-17.[4]

However, both the Board of Review and this Court have placed certain restraints on this principle. First, an employee subjected to abuse by a co-worker or supervisor must bring the matter to higher authorities so that it may be rectified.[5] Secondly, those alleging stress are generally required to provide medical proof.[6]

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[4] E.g. Newport Memorial Park v. Department of Employment and Training Board of Review, A.A. No. 90-122, at 4-6 (Dist.Ct. 9/8/1991)(DeRobbio, C.J.)(Good cause for resignation was shown where Claimant was subjected to ridicule for being a recovering alcoholic); Harrison v. Department of Employment and Training Board of Review, A.A. No. 93-85, at 10-12 (Dist.Ct. 3/8/1994)(Thomson, J.)(Harassment and name-calling deemed good cause to quit).

[5] E.g. Barbera v. Department of Employment and Training Board of Review, A.A. No. 96-38, at 5 (Dist.Ct.5/6/1996)(DeRobbio, C.J.)(Good cause for resignation was not shown despite allegation of harassment by supervisor where Claimant failed to report the incidents to higher management); Boisvert v. Department of Employment Security Board of Review, A.A. No. 77-271, at 2-3 (Dist.Ct. 2/12/1982)(Beretta, J.)(Benefits denied where Claimant did not bring conflict with supervisor to the

B

Mr. Bem's Allegation — The Evidence

Claimant explained that he had worked for Nappa Construction for eight or nine years as a full-time laborer.[7] His last day of work was August 19, 2014.[8] Mr. Bem told Referee Capozza that he gave two weeks' notice because of the employer's "abusive" working environment — by which he meant "… screaming, yelling, ah, you know, swearing and running (inaudible) around."[9] He described it as being "stressful" — causing him to lose weight.[10] He said the number of workers varied, adding that many people have quit for this

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attention of upper management or human resources officer).

6 E.g. Megalli v. Department of Employment and Training Board of Review, A.A. No. 94-92, at 6-7 (Dist.Ct. 7/3/1995)(Rahill, J.)(Denial of benefits affirmed where stress claim was unsupported by medical documentation); Nowell v. Department of Employment and Training Board of Review, A.A. No. 94-87, at 6-7 (Dist.Ct. 12/6/1994)(Cenerini, J.)(Stress and epilepsy claims found not to constitute good cause to quit where medical evidence not presented).

7 Referee Hearing Transcript, at 4-5.

8 Referee Hearing Transcript, at 5.

9 Referee Hearing Transcript, at 6. Later during his testimony he said that he could be at the other end of a job site and Mr. Nappa would be at the other end of the site, calling him names, putting him down. Referee Hearing Transcript, at 9.

10 Referee Hearing Transcript, at 6.

reason.[11] He said he tried to talk to the owner, asking him why he behaves in that manner, but received no answer.[12] Claimant testified that he asked the employer if he could calm down.[13] When asked by the Referee why his employer's demeanor became a problem, the Claimant answered that the employer was not always this way.[14] Mr. Bem said that when he told Mr. Nappa he was leaving — and why — Mr. Nappa said nothing.[15]

Mr. Bem said that he went to see a doctor the day after he resigned.[16] No medical documentation was provided.

Ms. McVerry testified that Claimant was able to speak to his employer — and did, on various matters.[17]

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11 Referee Hearing Transcript, at 6.

12 Referee Hearing Transcript, at 7-8.

13 Referee Hearing Transcript, at 8.

14 Referee Hearing Transcript, at 8. At this juncture the Referee commented that "contractors usually yell and swear" — to which Mr. Bem responded: "Not, not that much." Referee Hearing Transcript, at 8-9.

15 Referee Hearing Transcript, at 9.

16 Referee Hearing Transcript, at 10.

17 Referee Hearing Transcript, at 10-11. She added that Claimant was not a reliable employee. Referee Hearing Transcript, at 11-12.

C

Application of the Facts in Mr. Bem's Case to the Law

As stated above, Claimant asserted that he was subjected to abuse by his employer. The Referee seemed to accept the truth of these allegations. One supposes this was inevitable, since the employer's witness provided neither a specific (which she could not unless she was at the work sites) nor a general refutation of this allegation; to the contrary, she seemed to concede that the allegation was not out-of-character with regard to Mr. Nappa.

In denying benefits to Mr. Bem, Referee Capozza stressed that Claimant could have attempted to salvage his position by sitting down with Mr. Nappa and expressing his resentment at being abused, but failed to do so. And while one would never expect a victim of sexual harassment in an office-type environment to confront her abuser, this does not seem an unreasonable expectation in the context of a construction company work crew, which, (according to the Referee), would have a rowdier sensibility.[18]

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[18] Although the Referee did not mention this factor in his decision, I believe it should also be noted that, to the extent that it rests on his allegation of stress, Mr. Bem's lack of medical evidence is virtually fatal to his claim.

Also, on the issue of whether Mr. Bem could be expected to speak to Mr. Nappa regarding his treatment, Referee Capozza could also rely on Ms. McVerry's testimony that Claimant did speak to Mr. Nappa on other, delicate but important topics. See Referee Hearing Transcript, at 10-11.

D

Resolution

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe.[19] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[20] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated his employment without good cause is supported by reliable, probative and substantial evidence of record. I must therefore recommend that his disqualification under § 28-44-17 (Leaving without good cause) be affirmed.

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[19] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[20] Cahoone, supra n. 19, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 6 and Guarino, supra at 6, n. 1.

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, the instant decision was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

MARCH 19, 2015